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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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No. 190

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JAMES TURNER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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## REPLY ON BEHALF OF CLEVELAND BURGESS, AMICUS CURIAE, URGING REVERSAL

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## INTEREST OF AMICUS CURIAE

On August 15, 1969, Cleveland Burgess filed a brief *amicus curiae* in support of the petitioner, with the consent of the parties. In its subsequent brief, the Government responded to questions raised by the *amicus*, joining issue with most of his arguments and, in one very significant respect (the constitutionality of Count III of the indictment), conceding error and seeking reversal (Gov. Br. 28-32).

Since the arguments now center on the issues so joined, a brief reply is in order. Moreover, the provision by the Government of certain factual data from its files–data which hitherto have not been publically available but which are of value in resolving the legal issues posed by this case–calls for a short rejoinder.

Consequently, with the further consent of the parties, the *amicus curiae* respectfully tenders this reply.

## ARGUMENT

In its statement of Questions Presented, the Government asserts that this case involves the application of the due process and self-incrimination provisions of the Fifth Amendment to both statutory presumptions by which the petitioner was convicted.[1] The sum of the Government's defense is that each presumption satisfies the requirements of due process by resting on an asserted "rational connection" between the fact proved and the fact presumed, *Tot v. United States*, 319 U.S. 463, 467-8 (1943) (Gov. Br. 14-34)[2] and, on that account, escapes condemnation under

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[1] The Government responds selectively, however, to interrelated issues posed by the *amicus*. It asserts (Gov. Br. 34, fn. 36) that the self-incriminatory thrust of 26 U.S.C. 4704a, as a part of an overall statutory scheme (*Amicus* Br. 17-20, Arg. IIB), is beyond the issues presented for certiorari, and it offers no rebuttal to the contention that the presumptions of 21 U.S.C. 174 and 26 U.S.C. 4704a violate the Constitution's guarantees of trial by jury (*Amicus* Br. 15-6, Arg. IC). An unlimited grant of certiorari, however, embraces all relevant issues, U.S. Sup. Ct. Rule 23 (1)(c), 28 U.S.C.A.; moreover, this Court has accorded considerable reach to the due process clause–seen by the Government at issue in both questions presented here (Gov. Br. 2)–where penumbrae of other rights protected by the Federal Constitution are touched. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[2] The Government concedes, however, that there is no rational connection between possession of a package containing 14.68 grams of cocaine hydrochloride and sugar, five percent of which is cocaine, and inference of knowledge of illegal importation in 21 U.S.C. 174, in the light of the high rate of domestically manufactured cocaine

the Constitution as an instrument of self-incrimination (Gov. Br. 34-42).

By its simplicity and straightforwardness, this argument claims too much for rationality and too little for the scope of basic constitutional guarantees. Possession of narcotic drugs gives rise to a range of permissible inferences, other than the predicates of criminality under 21 U.S.C. 174 and 26 U.S.C. 4704a. (Arg. I). Moreover, even if the instant presumptions are "rational", the practical compulsion they work upon juries to reach guilty verdicts with "no evidence at all" as to key elements of the offense charged, *Tot v. United States*, 319 U.S. at 473 (concurring opinion), violates the Constitution's most fundamental procedural safeguards of fair trial. (Arg. II).

## I. BOTH EMPIRICALLY AND LOGICALLY, THE STATUTORY PRESUMPTIONS OF 21 U.S.C 174 AND 26 U.S.C. 4704a FAIL TO SATISFY THE TEST OF RATIONALITY REQUIRED BY DUE PROCESS OF LAW.

On a mere showing of possession of narcotic drugs, Federal courts regularly convict hapless defendants on the tortured and illogical presumptions of 21 U.S.C. 174 and 26 U.S.C. 4704a. "It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience." *Tot v. United States*, 319 U.S. at 468. Both empirical and logical analysis condemns their use as arbitrary, and, consequently, contrary to due process of law.

### A.

In urging affirmance of Count I (regarding heroin) and reversal of Count III (regarding cocaine), the Government asks this Court to measure the constitutionality of 21 U.S.C. 174 by a line that conforms in no identifiable way

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that is reported to find its way, through theft, into the illicit narcotics trade. (Gov. Br. 28-32).

with Congressional intent in controlling harmful drugs. Nor can a fair reading of available data sustain the rationality of such a line. The Government argues, on the one hand, that, since cocaine disappears out of legal channels in significant and measurable quantities, it is reasonable to presume that a possessor of cocaine knows his drug to have been unlawfully imported; on the other hand, the Government asserts, the same finding cannot be reported with respect to thefts of heroin lawfully present in the United States, so the presumption must be rational as applied to that drug.

By recognizing the multiple contingencies pertinent to the origins of processed narcotic drugs, this attempt to distinguish between cocaine and heroin confirms the pattern of logically valid alternative origins outlined for heroin in the main brief of the *amicus curiae* (pp. 8-11). Both cocaine and heroin are derived from plants that customarily grow outside the United States, respectively the coca shrub and the opium poppy (though there are also unimpeachable indications that the opium poppy has been and can be grown successfully in the United States, *Amicus* Br. 10-11, Gov. Br. 22-3, and though there is also evidence, Gov. Br. 20, fn. 17, that chemically synthetic heroin can be clandestinely produced). Because cocaine is openly manufactured under license in the United States for distribution through medical channels, thefts of that drug in processed form can be detected and recorded by the U.S. Bureau of Narcotics and Drug Abuse. To the extent the culture of heroin may appear to differ significantly from that of cocaine, any such difference must necessarily reflect the Bureau's disparate record-keeping capabilities and patterns of enforcement with respect to traffic that is, on the one hand, essentially clandestine and, on the other essentially legitimate.

In essence, then, the Government's attempt to differentiate between the origins of cocaine and heroin is based on its own ability to recognize that some cocaine—lawfully im-

ported and processed domestically, is directly available in illicit channels, and on its inability—or its unwillingness—to credit similar possibilities for heroin (based necessarily on clandestine rather than open domestic manufacture). Nonetheless, Government statistics aggregating thefts of the three regulated narcotics from which heroin may be derived—medical opium, morphine, and *codeine*[3]—suggest the possibility that the proportion of domestically processed heroin from sources not unlawfully imported is far in excess[4] of the "less than one percent of the estimated 1,500 kilograms of heroin smuggled into the United States annually" claimed by the Government. (Gov. Br. 20-21). Moreover, a recent Federal campaign to impose restrictions on the sale and dispensation of common cough syrups (containing codeine) and paregoric[5] points to an additional

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[3]There are authoritative indications that the chemical sources of heroin include the widely distributed pain-killer codeine, in addition to medical opium and morphine. Thus the Permanent Central Opium Board reported in 1953, as follows:

> "The Board learned that, in 1951 and for the first time, codeine had been converted into morphine. The government which reported this operation announced that 26 kg. of codeine had been used to produce 18 kg. of morphine, which is equivalent to a yield of about 70 percent." Permanent Central Opium Board, "Legal Trade in Narcotics in 1951," 5 Bulletin on Narcotics 48, 50 (No. 1, Jan-March, 1953) (United Nations)

[4]Applying appropriate conversion factors, as stated by the Government (Gov. Br. 19, fn. 15) and drawn from the previous footnote, to the quantities of regulated narcotics reported stolen in the year 1967 (Gov. Br. 44, Appendix) yields the following quantities of heroin able to be so produced—

| *Source* | *Quantity Stolen* (kg) | *Conversion Factor* | *Heroin* (kg) |
|---|---|---|---|
| Medical opium | 9.7 | 12.9/1 | .8 |
| Morphine | 7.8 | 10.2/10.2 | 7.8 |
| Codeine | 81.8 | 26/18* | 57.3 |
| | *(Conversion to Morphine) | TOTAL | 65.9 kg |

[5]On September 30, 1969, Mr. John E. Ingersoll, Director, U. S. Bureau of Narcotics and Drug Abuse stated that "hundreds of thou-

source of supply as handy as the front counter of the corner drugstore or supermarket. Consequently, the domestically manufactured supply of heroin may be even greater than that assumed from theft alone. For a recent conviction for so manufacturing a narcotic drug by culling opium from paregoric, see *Bibb v. Commonwealth*, 113 S.E.2d 798, 201 Va. 799 (1960).

Thus, while it is not surprising that a great volume of heroin is seized by Federal agents at ports and borders and by cooperating agents overseas each year (in the light of the deployment of such agents and the visibility of the traffic they monitor)[6], such statistics have, of course, absolutely no validity as a basis for rational inference regarding the amount of heroin domestically manufactured. Nor is it surprising that the Director of the Bureau of Narcotics can report that "we have not found a single clandestine laboratory for many years" (Gov. Br. 19), since kitchen laboratories are so notoriously easy to hide. More than words, perhaps, it is appropriate to look to the Govern-

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sands" of Americans are seriously misusing such preparations for their narcotic properties, indicating that Federal regulations effective October 10, 1969 will henceforth require that cough syrups containing low percentages of codeine and paregoric be sold only by registered pharmacists, to persons over 18 (unless by prescription), and in limited quantities. The New York *Times*, October 1, 1969, p. 19. In his prepared speech to which the above press-conference remarks relate, Mr. Ingersoll also asserted that "many new dangerous substances have found their way into the illicit market." He said that,

> "The discovery and production of these substances is a classic example of American know-how and ingenuity. Whoever says that the age of the small entrepreneur is a thing of the past in America, need only look at the drug 'scene' as it exists today for contradiction." Ingersoll, "New Horizons in Federal Control of Drug Abuse", U. S. Bureau of Narcotics and Dangerous Drugs, September 30, 1969 (xerox), p. 7.

[6]In the year 1967, 70.74 kg of heroin was seized at U. S. ports and borders, while 170.105 kg was seized overseas in cooperation with the U. S. See U. S. Bureau of Narcotics, Report on Traffic in Opium and Other Dangerous Drugs (1967) p. 43.

ment's actions in judging the seriousness with which the Government views the prospect of domestic manufacture of heroin; in this context, the recent prosecution in *U.S. v. Haden*, 397 F.2d 460 (C.A. 7, 1968), involving an effort to manufacture heroin from morphine sulfate, confirms the thorough-going realism of domestic manufacture as a source of heroin.

Beyond this point, the prospect of domestic manufacture being thus substantiated as a logical source of heroin, precise measurement is not needed to defeat the rationality of the presumption of foreign importation. In *Tot*, for example, this court was not concerned to determine the specific likelihood of firearm transactions occurring intrastate or prior to the effective date of the statute. Nor in *U.S. v. Romano*, 382 U.S. 136 (1966) was this Court interested in ascertaining the specific probability that persons present at stills might be engaged in activities other than those prohibited by the statute. In those instances, as here, substantiation of the existence of a realistic alternative to the fact presumed was sufficient to defeat the statutory inference.

However, even if it be assumed that the presumption of illegal importation is valid, *Leary v. U.S.*, 395 U.S. 6 (1969) teaches that the further presumption of 21 U.S.C. 174 concerning knowledge of illegal importation must fall. In *Leary* it was pointed out that–

> "Once it is established that a significant percentage of domestically consumed marihuana *may not have been imported at all*, then it can no longer be postulated, without proof, that possessors will be even roughly aware of the proportion actually imported." 395 U.S. at 46. (emphasis added)

With respect to domestically consumed heroin, the foregoing analysis suggests that the test is satisfied and that proof must consequently be supplied to support the presumption of knowledge. Seeking to discharge this burden, the Government's reliance on "widespread notoriety in the

news media—both on television and in the press" (Gov. Br. 26)—is patently inadequate and, indeed, misleading.

To the contrary, the indications are legion that lower-echelon participants in heroin traffic are by and large drawn from the lowest levels of society—poor, uneducated, and ethnically disadvantaged. See for example, Hearings before a Subcommittee of the House Ways and Means Committee, "Traffic in Narcotics," 84th Congress, 1st Sess. (1955), pp. 1301-1507 *passim*; U. S. Bureau of Narcotics, Report on Traffic in Opium and Other Dangerous Drugs (1967), p. 49. In 1967, the President's Commission on Law Enforcement and the Administration of Justice reported:

> "In the states where heroin addiction exists on a large scale, it is an urban problem. Within the cities it is largely found in areas with low average incomes, poor housing, and high delinquency. The addict himself is likely to be male, between the ages of 21 and 30, poorly educated and unskilled, and a member of a disadvantaged ethnic minority group." The President's Commission on Law Enforcement and the Administration of Justice, Report: "The Challenge of Crime in a Free Society", pp. 212-3 (1967).

Authoritative studies indicate that heroin users neither know nor care much about their drug, or indeed about the world in which they live. See Blum, "Mind-Altering Drugs and Dangerous Behavior: Narcotics", in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: "Narcotics and Drug Abuse" (1967) pp. 50-52; White House Conference Panel on Drug Abuse, Report, p. 290 (1962); and Chien, *The Road to H* (1964), pp. 52-3.

In sum, the conclusion flatly stated by the Court of Appeals for the Tenth Circuit in *Griego v. U.S.*, 298 F.2d 545, 549 (1962), is also applicable here, that

> "it is probable that many narcotic offenders can testify truthfully that they had no knowledge of un-

> lawful importation. Those so engaged are not concerned with the primary sources of the contraband commodity."

Thus the presumption of knowledge of unlawful importation cannot be sustained on a finding that most heroin possessors know either of the origins of their drugs or of heroin in general. By this token, the presumption of knowledge is clearly irrational.

B.

The Government asserts that the statutory presumption contained in 26 U.S.C. 4704a satisfies the requirements of due process inasmuch as it too rests on a purportedly rational base. The Government urges that "the decision in *Casey v. United States,* 276 U.S. 413, upholding the validity of this presumption should be reaffirmed as applied to the facts of the present case." (Gov. Br. 32-4). Indeed, read in the light of these facts, the holding of *Tot* strongly suggests that the presumption of violation arising from mere possession should now be invalidated and *Casey* specifically overruled.

*Tot* recited a carefully limited basis for the holding in *Casey,* that

> "the presumption created by the statute that a *sale* of morphine from an unstamped package should be prima facie evidence of a similar *purchase* was not unreasonable or beyond the realm of common experience." 319 U.S. at 472 (emphasis added)

Here, by contrast, the fact from which the presumption arises is possession by three individuals of small quantities of narcotics, about seven grams of heroin and .7 grams of cocaine, a situation without pecuniary overtones. Illustrating the indifference to procedural fairness which has overtaken the application of the presumption, Counts II and IV charged, tautologically, that Turner did

> "knowingly, wilfully and unlawfully, purchase, *possess,* and dispense and distribute a narcotic drug . . ." (App. 7-8) (emphasis added).

To the extent conviction thereunder is not *ipso facto* reversible as inconsistent with the statutory authority of 26 U.S.C. 4704a, the application of the presumption is clearly irrational. The presumption from possession may not rationally be applied to convict Turner of having sold, dispensed, or distributed a narcotic drug, since these acts would, obviously, follow after his possession. Moreover, the statute's recognition of these three alternative modes of *passing on* a narcotic drug (along with the exemptions to the coverage of Subsection (a) set forth in Subsection (b) of Section 4704) surely suggests that there are ways, other than purchase, by which Turner may have *acquired* the drugs. Under *Tot* and *Romano*, therefore, the inference of violation of 26 U.S.C. 4704a from mere possession is arbitrary, irrational and inconsistent with due process of law.

## II. ASIDE FROM THEIR IRRATIONALITY, THE INSTANT PRESUMPTIONS OPERATE TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL

In its brief, the Government takes the position that if a rational connection exists between the fact proven and the fact presumed, statutory presumptions wholly satisfy the requirements of due process and, moreover, compel self-incrimination no more than any evidence justifying the rational inference of guilt. (Gov. Br. 34-5) Rationality is, indeed, a *sine qua non* of due process, but it is not, nor has it ever been, sufficient basis for consistency with the commands of the Constitution. Long ago, this Court held in *Bailey v. Alabama*, 219 U.S. 219 (1910) that

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not an escape from constitutional restrictions." 219 U.S. at 239.

Thus the dilemmas worked by these presumptions must be measured independently against substantive constitutional rights of fair trial procedure.

*Bailey* teaches, and subsequent cases confirm, that the constitutionality of a statutory presumption must be appraised in the light of its practical effects. In Bailey, where a state statute provided that failure to perform personal services after receiving payment therefor was *prima facie* evidence of intent to defraud, this Court reached the conclusion that the statutory presumption contravened a constitutional right upon the following practical construction–

> "The point is that . . . the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict." 219 U.S. at 235.

In this context, the presumption in 21 U.S.C. 174 similarly authorizes the jury to convict, though there is "no evidence at all", *Tot v. U.S.*, 319 U.S. at 473 (concurring opinion) with regard to any of the multiple possible origins of the drugs in the defendant's possession or with regard to his knowledge or lack thereof of the many furtive hands through which it may have passed. Similarly, even the presumption in 26 U.S.C. 4704a, authorizing conviction for a number of inferred acts, is sufficiently unrelated to the fact of possession to invoke the requirement of procedural fairness applied in *Tot* and articulated in *Leary* that

> "because of the danger of overreaching it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant." 395 U.S. at 45, citing *Tot*, 319 U.S. at 469, and distinguishing *Yee Hem v. United States*, 268 U.S. 178, 184 (1925).

Thus, statutory presumptions cannot work to shift the burden of proving guilt from the prosecution to the defendant, as do the presumptions here in question, without violating due process of law. *Morrison v. California*, 291 U.S. 82, 96-7 (1934); *Tot v. United States, supra; Speiser v. Randall*, 357 U.S. 513, 535-6 (1958); *Dombrowski v. Pfister*, 380 U.S. 479, 496 (1965). *U.S. v. Romano*, 382

U.S. 136, 144 (1965). *Leary v. United States, supra,* 395 U.S. at 36, fn. 64 and authorities cited. Nor can these presumptions constitutionally operate to deprive a defendant of other protected rights, *U.S. v. Gainey,* 380 U.S. 63, 83-88 (dissenting opinion), *Leary v. U.S.,* 395 U.S. at 55-6 (concurring opinion)–specifically, in this case, his rights to trial by jury and to freedom from self-incrimination. (*Amicus* Br. 12-20).

## CONCLUSION

For the reasons set forth in the brief of the amicus curiae and in this reply brief, the conviction of petitioner Turner should be reversed.

Respectfully submitted,

Steven R. Rivkin

*Counsel for Amicus Curiae, Cleveland Burgess*
(Appointed by the United States Court of Appeals for the District of Columbia Circuit)

October 6, 1969

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply on Behalf of Cleveland Burgess, Amicus Curiae, have been served in hand this 6th day of October, 1969 upon the Office of the Solicitor General, U.S. Department of Justice, and the United States Attorney for the District of Columbia, U.S. Courthouse, Washington, D.C., and by mail, postage prepaid, upon counsel for petitioner, Josiah E. DuBois, Jr., 511 Cooper Street, Camden, N.J. 08101.

Steven R. Rivkin